The Technology, Media and Telecommunications Review

Fifth Edition

Editor
John P Janka

Law Business Research
THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

Fifth Edition

Editor

JOHN P JANKA

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This fully updated fifth edition of The Technology, Media and Telecommunications Review provides an overview of the evolving legal constructs that govern the issues facing lawmakers and regulators, as well as service providers and new start-ups, in 29 jurisdictions around the world.

As noted in the previous edition, the pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models continue to fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today’s world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a ‘light touch’ in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do
not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the ‘new media’ conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address ‘network neutrality’ concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

I would like to take the opportunity to thank all the contributors for their analytical input into this publication. In the space allotted, the authors simply cannot address all of the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

John P Janka
Latham & Watkins LLP
Washington, DC
October 2014
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>3G</td>
<td>Third-generation (technology)</td>
</tr>
<tr>
<td>4G</td>
<td>Fourth-generation (technology)</td>
</tr>
<tr>
<td>ADSL</td>
<td>Asymmetric digital subscriber line</td>
</tr>
<tr>
<td>AMPS</td>
<td>Advanced mobile phone system</td>
</tr>
<tr>
<td>ARPU</td>
<td>Average revenue per user</td>
</tr>
<tr>
<td>BIAP</td>
<td>Broadband internet access provider</td>
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<tr>
<td>BWA</td>
<td>Broadband wireless access</td>
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<tr>
<td>CATV</td>
<td>Cable TV</td>
</tr>
<tr>
<td>CDMA</td>
<td>Code division multiple access</td>
</tr>
<tr>
<td>CMTS</td>
<td>Cellular mobile telephone system</td>
</tr>
<tr>
<td>DAB</td>
<td>Digital audio broadcasting</td>
</tr>
<tr>
<td>DECT</td>
<td>Digital enhanced cordless telecommunications</td>
</tr>
<tr>
<td>DDoS</td>
<td>Distributed denial-of-service</td>
</tr>
<tr>
<td>DoS</td>
<td>Denial-of-service</td>
</tr>
<tr>
<td>DSL</td>
<td>Digital subscriber line</td>
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<tr>
<td>DTH</td>
<td>Direct-to-home</td>
</tr>
<tr>
<td>DTTV</td>
<td>Digital terrestrial TV</td>
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<tr>
<td>DVB</td>
<td>Digital video broadcast</td>
</tr>
<tr>
<td>DVB-H</td>
<td>Digital video broadcast – handheld</td>
</tr>
<tr>
<td>DVB-T</td>
<td>Digital video broadcast – terrestrial</td>
</tr>
<tr>
<td>ECN</td>
<td>Electronic communications network</td>
</tr>
<tr>
<td>ECS</td>
<td>Electronic communications service</td>
</tr>
<tr>
<td>EDGE</td>
<td>Enhanced data rates for GSM evolution</td>
</tr>
<tr>
<td>FAC</td>
<td>Full allocated historical cost</td>
</tr>
<tr>
<td>FBO</td>
<td>Facilities-based operator</td>
</tr>
<tr>
<td>FCL</td>
<td>Fixed carrier licence</td>
</tr>
<tr>
<td>FTNS</td>
<td>Fixed telecommunications network services</td>
</tr>
<tr>
<td>FTTC</td>
<td>Fibre to the curb</td>
</tr>
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</table>
List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>FTTH</td>
<td>Fibre to the home</td>
</tr>
<tr>
<td>FTTN</td>
<td>Fibre to the node</td>
</tr>
<tr>
<td>FTTx</td>
<td>Fibre to the x</td>
</tr>
<tr>
<td>FWA</td>
<td>Fixed wireless access</td>
</tr>
<tr>
<td>Gb/s</td>
<td>Gigabits per second</td>
</tr>
<tr>
<td>GB/s</td>
<td>Gigabytes per second</td>
</tr>
<tr>
<td>GSM</td>
<td>Global system for mobile communications</td>
</tr>
<tr>
<td>HDTV</td>
<td>High-definition TV</td>
</tr>
<tr>
<td>HITS</td>
<td>Headend in the sky</td>
</tr>
<tr>
<td>HSPA</td>
<td>High-speed packet access</td>
</tr>
<tr>
<td>IaaS</td>
<td>Infrastructure as a service</td>
</tr>
<tr>
<td>IAC</td>
<td>Internet access provider</td>
</tr>
<tr>
<td>ICP</td>
<td>Internet content provider</td>
</tr>
<tr>
<td>ICT</td>
<td>Information and communications technology</td>
</tr>
<tr>
<td>IPTV</td>
<td>Internet protocol TV</td>
</tr>
<tr>
<td>IPv6</td>
<td>Internet protocol version 6</td>
</tr>
<tr>
<td>ISP</td>
<td>Internet service provider</td>
</tr>
<tr>
<td>kb/s</td>
<td>Kilobits per second</td>
</tr>
<tr>
<td>kB/s</td>
<td>Kilobytes per second</td>
</tr>
<tr>
<td>LAN</td>
<td>Local area network</td>
</tr>
<tr>
<td>LRIC</td>
<td>Long-run incremental cost</td>
</tr>
<tr>
<td>LTE</td>
<td>Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)</td>
</tr>
<tr>
<td>Mb/s</td>
<td>Megabits per second</td>
</tr>
<tr>
<td>MB/s</td>
<td>Megabytes per second</td>
</tr>
<tr>
<td>MMDS</td>
<td>Multichannel multipoint distribution service</td>
</tr>
<tr>
<td>MMS</td>
<td>Multimedia messaging service</td>
</tr>
<tr>
<td>MNO</td>
<td>Mobile network operator</td>
</tr>
<tr>
<td>MSO</td>
<td>Multi-system operators</td>
</tr>
<tr>
<td>MVNO</td>
<td>Mobile virtual network operator</td>
</tr>
<tr>
<td>MWA</td>
<td>Mobile wireless access</td>
</tr>
<tr>
<td>NFC</td>
<td>Near field communication</td>
</tr>
<tr>
<td>NGA</td>
<td>Next-generation access</td>
</tr>
<tr>
<td>NIC</td>
<td>Network information centre</td>
</tr>
<tr>
<td>NRA</td>
<td>National regulatory authority</td>
</tr>
<tr>
<td>OTT</td>
<td>Over-the-top (providers)</td>
</tr>
<tr>
<td>PaaS</td>
<td>Platform as a service</td>
</tr>
<tr>
<td>PNETS</td>
<td>Public non-exclusive telecommunications service</td>
</tr>
<tr>
<td>PSTN</td>
<td>Public switched telephone network</td>
</tr>
<tr>
<td>RF</td>
<td>Radio frequency</td>
</tr>
<tr>
<td>SaaS</td>
<td>Software as a service</td>
</tr>
<tr>
<td>SBO</td>
<td>Services-based operator</td>
</tr>
<tr>
<td>SMS</td>
<td>Short message service</td>
</tr>
<tr>
<td>STD–PCOs</td>
<td>Subscriber trunk dialling–public call offices</td>
</tr>
<tr>
<td>UAS</td>
<td>Unified access services</td>
</tr>
<tr>
<td>UASL</td>
<td>Unified access services licence</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>------------------------------</td>
</tr>
<tr>
<td>UCL</td>
<td>Unified carrier licence</td>
</tr>
<tr>
<td>UHF</td>
<td>Ultra-high frequency</td>
</tr>
<tr>
<td>UMTS</td>
<td>Universal mobile telecommunications service</td>
</tr>
<tr>
<td>USO</td>
<td>Universal service obligation</td>
</tr>
<tr>
<td>UWB</td>
<td>Ultra-wideband</td>
</tr>
<tr>
<td>VDSL</td>
<td>Very high speed digital subscriber line</td>
</tr>
<tr>
<td>VHF</td>
<td>Very high frequency</td>
</tr>
<tr>
<td>VOD</td>
<td>Video on demand</td>
</tr>
<tr>
<td>VoB</td>
<td>Voice over broadband</td>
</tr>
<tr>
<td>VoIP</td>
<td>Voice over internet protocol</td>
</tr>
<tr>
<td>W-CDMA</td>
<td>Wideband code division multiple access</td>
</tr>
<tr>
<td>WiMAX</td>
<td>Worldwide interoperability for microwave access</td>
</tr>
</tbody>
</table>
Chapter 7

FRANCE

Myria Saarinen and Jean-Luc Juhan

I OVERVIEW

The French regulatory framework is still based on the historical distinction between telecoms and postal activities, on the one hand, and radio and television activities, on the other hand (sectors are still governed by separate legislation and by separate regulators). Amendments in the past 15 years were conceived as to reflect the progress and the convergence of electronic communications, media and technologies; and the liberalisation of the TMT sectors caused by the de facto competition between fixed telephony (a monopoly until 1998) and new technologies of terrestrial, satellite and internet networks. French law also mirrors the EU regulatory framework through the enactment of the three EU Telecoms Packages in 1996, 2002 and 2009 that have been fully transposed into French law.

The TMT sectors in France have been fully open to competition since 1 January 1998 and are characterised by the interactions of mandatory provisions originating from many sources and involving many actors (regulators, telecoms operators and local, regional and national authorities). The TMT sectors are key to the French economy and 2013 is once again an important year in many respects for these sectors’ business.

The major trends in the telecommunications and internet sectors in 2013 were (1) the acceleration in the transition to superfast broadband on both fixed and mobile networks, as much in terms of coverage as subscription numbers; (2) the start of growing reconfiguration of the sector, brought in particular by Vivendi’s decision to sell off SFR, France’s second-largest mobile operator; and (3) the growing imbalance of economic power between the top internet companies and ISPs, which is one of the central issues of today’s net neutrality debate. Wholesale and retail electronic communications markets

1 Myria Saarinen and Jean-Luc Juhan are partners at Latham & Watkins. This chapter was written with the contributions of associates Clémence Macé de Gastines and Oriane Fauré.
in France generated €46.6 billion in revenue, marking the third consecutive annual
decrease, which can be attributed to the drop in retail prices (-10.3 per cent according
to the national statistics office, INSEE), which has only been partially offset by the rise in
volume. However, the average EBITDA remained unchanged from 2012, which can be
attributed in particular to a drop in costs enabled by sizeable productivity gains. Having
acquired no licences in 2013, operators were able to maintain their essential physical
investments at the record-high levels reached in 2011 and 2012, €7.1 billion, which
allowed them to finance the deployment of next-generation fixed and mobile superfine
networks, in addition to upgrading their existing systems.2

In 2013 media markets were marked by the ‘continuity and renewal’ of regulation,
in particular with the adoption of new legal provisions aiming at increasing the
independence of the French public broadcasting and improving spectrum management.3

II REGULATION

i The regulators

There are four specialist authorities involved in the regulation of technology, media and
telecommunications in France:

a The Electronic Communications and Postal Regulatory Authority (ARCEP) is
the independent government agency that oversees the electronic communications
and postal services sector. It ensures the implementation of a universal service,
imposes requirements upon operators that exert a significant influence in the
context of market analyses, participates in defining the regulatory framework,
allocates finite resources (radio frequencies and numbers), sanctions,4 resolves
disputes and delivers authorisations for postal activities.

b The Superior Audio-visual Council (CSA) is the regulatory authority responsible
for the audio-visual sector. The CSA sets rules on broadcasting content and
allocates frequencies by granting licences to radio and television operators. It
also settles disputes that may arise between TV channels and their distributors,
and is empowered to impose sanctions on operators in case of breach of
specific regulations. Law No. 2013-1028 of 15 November 2013 relating to the
independence of the French public service broadcasting has amended the legal

2 See the ARCEP annual report, 2013.
3 See the CSA annual report, 2013.
4 The ARCEP’s sanctioning power has been restored by Order No. 2014-329 of 12 March 2014
on the Digital Economy after the French Constitutional Council ruled that the legal provisions
contained in the CPCE governing ARCEP’s power to sanction were unconstitutional as they
did not comply with the principle of impartiality (see Constitutional Council, Decision No.
2013-331 QPC of 5 July 2013). The new provisions in the CPCE introduce a separation of the
proceedings and the adjudication functions by assigning them to different members of the
ARCEP Board (see new Articles L5-3, L36-11 and L130 of the CPCE). The terms of appli-
cation for this new sanctions procedure have been specified by a Decree No. 2014-867 of
1 August 2014 (see new Articles D594 to D599 of the CPCE).
nature of the CSA, its composition, the status and appointment procedure of its members and their powers (see Section IV.i, infra).

c The Data Protection Authority (CNIL) ensures the protection of personal data. Automatic personal data processing systems must be declared to the CNIL. The CNIL also supervises compliance with the law, by inspecting IT systems and applications, and is empowered to issue sanctions that range from warnings to fines.

d The High Authority for the Distribution of Works and the Protection of copyright on the Internet (HADOPI), which was established in 2009, is in charge of protecting intellectual property rights over works of art and literature on the internet.

These four authorities may deliver opinions upon request by the government, parliament or other independent administrative authorities such as the French Competition Authority (FCA), which also renders decisions and opinions that may have a structural impact on these sectors (except for HADOPI). The National Frequencies Agency is also an important agency responsible for managing frequency spectrum and planning its use (see Section IV, infra).

The CSA and ARCEP are the two main regulators in the TMT sectors. Discussions about the opportunity to merge these two entities at the time of the convergence or to limit the powers of ARCEP have regularly occurred within the past years. Finally, the merger proposal was given up. Instead, it was argued that the two regulators should work in closer cooperation on certain common subjects.

The prevailing regulatory regime in France regarding electronic communications is contained primarily in the Post and Electronic Communications Code (CPCE) and regarding audio-visual communications in Law No. 86-1067 of 30 September 1986 on Freedom to Communicate, as subsequently amended. The main piece of legislation governing the law applicable to data protection is Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties, as subsequently amended. Intellectual property rights are governed by the Intellectual Property Code.

ii Regulated activities

Telecoms

Telecoms activities and related authorisations/licences are regulated under the CPCE.

To become a telecoms operator, no specific licences or authorisations are required; the implementation and the operation of public networks and the supply of electronic communication services to the public is free, subject to prior notification to ARCEP (Articles L32-1 and L33-1 of the CPCE).

Conversely, the use of radio frequencies requires a licence granted by ARCEP (Article L42-1 of the CPCE).

Media

Authorisations and licensing in the media sector are regulated under Law No. 86-1067 of 30 September 1986.
Authorisations for private television and radio broadcasting on the hertz-based terrestrial frequencies are granted by the CSA following bid tenders and subject to the conclusion of an agreement with the CSA. The term of authorisations cannot exceed 10 years. Broadcasting services that are not subject to CSA’s authorisation, namely, those broadcast or distributed through a network that does not use frequencies allocated by the CSA (cable, satellite, ADSL, internet, telephony, etc.) are nevertheless subject to a standard agreement or a declaration regime.

iii Ownership and market access restrictions

General regulation of foreign investment
Since the entry into force of Law No. 2004-669 of 9 July 2004, the discrimination of non-EU operators is prohibited and they are subject to the same rights and obligations as EU and national operators. According to Article L151-1 et seq. of the French Monetary and Financial Code, when a foreign (EU or non-EU) investment is made in a strategic sector (such as security, public defence, cryptographics or interception of correspondence), the investor must submit a formal application dossier to the French Ministry of Economy for prior authorisation. Any transaction concluded without prior authorisation is null and void, and criminal sanctions (imprisonment of five years and a fine amounting to twice the amount of the transaction) are also applicable. A recent decree of 14 May 2014 has expanded the list of sectors in which foreign investors must seek prior authorisation by the French Ministry of Economy. In particular, the decree has added to the regulated activities referred to in Article R153-2 of the French Monetary and Financial Code, activities relating to the integrity, security and continuity of operation of networks and electronic communications services.

Specific ownership restrictions applicable to the media sector
French regulations provide for media ownership restrictions in order to preserve media pluralism and competition. In particular, any single individual or legal entity cannot hold, directly or indirectly, more than 49 per cent of the capital or the voting rights of a company that has an authorisation to provide a national terrestrial television service where the average audience for television services (either digital or analogue) exceeds 8 per cent. In addition, any single individual or legal entity that already holds a national terrestrial television service where the average audience for this service exceeds 8 per cent may not, directly or indirectly, hold more than 33 per cent of the capital or voting rights of a company that has an authorisation to provide a local terrestrial television service.

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5 See Articles 28 to 32 of the Law of 30 September 1986 which determine the CSA’s allocation procedures.
6 Articles 33 to 34-5 of the Law of 30 September 1986.
7 Article L33-1 III of the CPCE.
Further, unless otherwise agreed in international agreements to which France is a party, a foreign national may not acquire shares in a company holding a licence for a radio or television service in France and that uses radio frequencies if this acquisition has the effect of raising (directly or indirectly) the share of capital or voting rights owned by foreign nationals to more than 20 per cent. This provision does not apply to service providers of which at least 80 per cent of the capital or voting rights are held by public radio broadcasters belonging to Council of Europe Member States, and of which at least 20 per cent is owned by one of the public companies mentioned in Article 44 of the Law of 30 September 1986. Specific rules restricting cross-media ownership also apply.

iv Transfers of control and assignments

The general French merger control framework applies to the TMT sectors, without prejudice to the aforementioned ownership restrictions and to specific provision for the media sector. The merger control rules are enforced by the FCA.

Regarding the telecoms and post sectors, the FCA must provide ARCEP with any referrals regarding merger control and the ARCEP can issue a non-binding opinion.

Regarding companies active in the radio or TV sector involved in a Phase II merger control procedure before the FCA, the FCA must obtain a non-binding opinion from the CSA.

Any modification to the capital of companies authorised by the CSA to broadcast TV or radio services on a frequency is subject to the approval of the CSA.

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12 Articles 41-1 to 41-2-1 of the Law of 30 September 1986.
13 For recent examples of mergers in the TMT sectors, see Decision of the FCA of 2 April 2014 No. 14-DCC-50 in which the FCA ruled again on the acquisition of D8 and D17 (formerly Direct 8 and Direct Star) by Canal Plus group, after the decision was quashed by the Council of State (the highest French administrative court), and cleared the transaction subject to several commitments (available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14DCC50); see also Decisions of 22 January 2014 No. 14-DCC-09 and of 24 December 2013 No. 13-DCC-199 regarding a series of acquisitions by the Altice group in the telecommunications sector (respectively of Numericable, a cable network electronic communications operator, and Mobius, telecoms operator in Réunion; available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=14DCC09 and www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13DCC199). In June 2014, Altice/Numericable notified the proposed acquisition of mobile operator SFR to the FCA which opened in-depth probe in July 2014. The FCA is still reviewing the merger (see Section VI.ii, infra).
14 Article L36-10 of the CPCE.
III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Under the CPCE, electronic communications services other than voice telephony to the public may be provided freely.\textsuperscript{17}

As regards the ADSL network, and following local loop unbundling, alternative operators must be provided with direct access to the copper pair infrastructure of France Télécom, the historical operator. Therefore, as with traditional fixed telephony, DSL networks are subject to asymmetrical regulation.

As regards services ISPs can operate freely and provide services but they must file a declaration with ARCEP before commencing operations.\textsuperscript{18} A failure to comply with this obligation constitutes a criminal offence.\textsuperscript{19}

More generally, ISPs must comply with the provisions of Law No. 2004-575 of 21 June 2004 on Confidence in the Digital Economy governing e-commerce, encryption and liability of technical service providers, as subsequently amended. Law No. 2004-575 of 21 June 2004 also sets out a liability exemption regime for hosting service providers. They are not subject to a general obligation to monitor the information they transmit or store, nor are they obliged to look for facts or circumstances indicating illicit activity. Nevertheless, when the provider becomes aware that the data stored is obviously illicit, it has the obligation to remove the data or render its access impossible. In that respect, the question of the qualification as ‘host provider’ has been widely debated by French courts.\textsuperscript{20}

\textsuperscript{17} Article L32-1 of the CPCE.

\textsuperscript{18} Article L33-1 of the CPCE.

\textsuperscript{19} Article L39 of the CPCE. This risk is not theoretical: in March 2013, ARCEP informed the Paris Public Prosecutor of Skype’s possible failure to comply with its obligation to declare itself as an electronic communications operator in France. According to ARCEP, most, if not all of the services that Skype provides relate to electronic communications; this does seem to be the case for the service that allows internet users located in France to call fixed and mobile numbers in France and around the world, using their computer or smartphone. As a result, ARCEP has requested several times that Skype declare itself as an electronic communications operator, which the company has so far failed to do.

\textsuperscript{20} This issue now seems resolved regarding video-sharing sites: see for instance the judgment by the French Supreme Court (Cass. civ. 1ère, 17 February 2011, No. 09-67896, Joyeux Noël) in which the Supreme Court recognised a simple hosting status for Dailymotion. This issue is still to be debated with respect to online marketplaces such as eBay from which it follows that French courts, which are favouring a very factual analysis of the role of the services provider, will give significant importance to judges’ discretion. In that respect, See Cass. Com, 3 May 2012, No. 11-10.507, Christian Dior Couture; No. 11-10.505, Louis Vuitton Malletier; No. 11-10.508, Parfums Christian Dior, in which the Supreme Court confirmed an earlier decision of the Paris Court of Appeal that did not consider eBay as a ‘host provider’ and therefore refused to apply the liability-exemption regime. See in contrast, the Brocanteurs v. eBay case, CA Paris, Pôle 5, ch. 1, 4 April 2012, No. 10-00.878 in which second-hand and antique dealers accused
Universal service

The EU framework for universal services obligations, which defines universal services as the 'minimum set of services of specified quality to which all end users have access, at an affordable price in the light of specific national conditions, without distorting competition',\(^{21}\) has been implemented by Law No. 96-659 of 26 July 1996 and further strengthened by Law No. 2008-3 of 3 January 2008. Universal service is one of the three components of public service in the telecoms sector in France (the two others being the supply of mandatory services for electronic communications and general interest missions).

Obligations of the operator in charge of universal service are listed in Article L35-1 of the CPCE and falls into three main categories of services:

- **a** telephone service: connection to an affordable public telephone network enabling end-users to take charge of voice communications, facsimile communications and data communications at data rates that are sufficient to permit functional internet access and free emergency calls;

- **b** enquiry and directory services (both in printed and electronic versions); and

- **c** public payphones covering the national territory.

These services must be rendered at tariff and technical conditions that take into consideration the difficulties faced by some users, such as users with low incomes, and that do not discriminate between users on the ground of their geographical location.

The designation of the operator or operators in charge of universal service is made by the Minister in charge of electronic communications, following calls for applications (one per category). So far, only France Télécom-Orange has been selected as the operator guaranteeing the provision of universal services.

Universal service currently only covers telephone provision and not information technologies. However, in an Opinion No. 11-A-10 of 29 June 2011, the FCA considered that the reduced price policy (also called the 'social tariff') set up for telephone networks, pursuant to universal service rules, might be extended to internet services even though the EU Telecoms Package does not expressly allow for the inclusion of such in the universal service. In the absence of regulation, France Télécom-Orange launched a 'social tariff' for multi-service offers (telephone and internet) on 9 February 2012.

ARCEP determines the cost of universal service and, when it is necessary to finance it in case it represents an excessive burden for the operator in charge, ARCEP also determines the amount of the other operators’ contributions to the financing of universal service obligations through a sectorial fund. In principle, every operator contributes to eBay of encouraging illegal practices providing individuals with the means to compete unfairly against professionals, the Paris Court of Appeal considered eBay as a host provider able to benefit from the liability-exemption regime. The Court of Appeal based its decision on the fact that eBay had no knowledge or control of the ads stored on its site. If the seller was asked to provide certain information, it was for the purpose of ensuring a more secure relationship between its users.

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\(^{21}\) Article 1(2) of Directive No. 2002/22/EC.
the financing, each contribution being calculated on the basis of the turnover realised by
the operator in their electronic communications activities. 22

iii  Restrictions on the provision of service

Net neutrality is a growing policy concern in France. 23 From the electronic communications
regulator’s standpoint which focuses on the technical and economic conditions of traffic
conveyance on the Internet, the key question in the debate over net neutrality is how
much control internet stakeholders can rightfully exert over the traffic. This implies
examining operators’ practices on their networks, as well as their relationships with some
content and application providers.

In that respect, ARCEP started discussions on net neutrality in 2010 that led
to the issuance of 10 proposals to ensure the internet’s smooth operation and balanced
development, and to define the tools needed to maintain this balance.

ARCEP also issued an important decision on 29 March 2012 giving it the
ability to gather information on the market for interconnection between ISPs and the
main content and application providers. 24 The ARCEP decision had been disputed by
American carriers AT&T and Verizon (MCI Communications Services) and by their
French subsidiaries but the Council of State confirmed its legality in a decision dated
10 July 2013. 25 Feedback and lessons drawn from the first three rounds of information
gathering in 2012 and 2013, along with the administrative inquiry that ARCEP
conducted between November 2012 and July 2013 into interconnection between Iliad
and Google, 26 have led the Authority to amend its 2012 decision. The new decision dated
18 March 2014 27 introduces two main changes to the system established in 2012: (1) it
distinguishes the installed and configured capacity on each interconnection link covered
by the decision; (2) it also allows ARCEP to request additional information periodically,
to enable it to assess the scale of a presumed traffic overload on interconnection links. For
the sake of simplicity, ARCEP has also reduced the amount of information that operators
are required to provide, and the number of relationships covered by the decision.

Also in the context of net neutrality, the FCA issued a decision on 20 September
2012 28 regarding the dispute between the US operator Cogent and France Télécom in
relation to a controversial issue: whether network operators are entitled to charge for

22 Article L35-3 of the CPCE.
23 See the opinion issued on 1 March 2013 by the French Digital Council (CNN) (available
at www.cnnumerique.fr/wp-content/uploads/2013/03/130311-avis-net-neutralite-VFINALE.
pdf).
25 Council of State, decision No. 360397 of 10 July 2013.
26 Decision No. 2013-0987 of 16 July 2013 by which ARCEP closed the administrative inquiry
involving several companies, including Free and Google, on the technical and financial terms
governing IP traffic routing.
28 Decision of the FCA of 20 September 2012 No. 12-D-18 on practices concerning reciprocal
interconnection services in the area of internet connectivity.
opening additional capacity. The MegaUpload website – since then shut down by US authorities – was a Cogent customer that used to send, via Cogent, to subscribers of France Télécom's subsidiary Orange, very significant traffic volumes (up to 13 times greater than in the other direction), essentially video content downloaded by web users. In view of the severely asymmetric traffic to its detriment, exceeding the maximum ratio stated in its peering policy, France Télécom wished to charge for opening additional interconnection capacity. The FCA considered that such a practice was not liable to contravene competition law inasmuch as France Télécom did not refuse access to its subscribers by Cogent – and indeed opened additional capacity free of charge on several occasions between 2005 and 2011, in response to demand from Cogent – but simply requested payment for opening new capacity, in accordance with its peering policy, without seeking to charge for existing capacity hitherto provided free of charge. The FCA's decision has been confirmed by the Paris Court of Appeal in a decision of 19 December 2013. An appeal against this decision is now pending before the French Supreme Court.

As to content, pursuant to the Law of 21 June 2004, ISPs have a purely technical role and they do not have the general obligation to review the content that they transmit or store. Nevertheless, when informed of unlawful information or activity, they must take prompt action to withdraw the relevant content, failing which their civil liability may be sought. Since 2009, HADOPI has been competent to address theft and piracy matters. It intervenes when requested by regularly constituted bodies for professional defence which are entitled to institute legal proceedings in order to defend the interests entrusted to them under their statutes (e.g., SACEM), or by the public prosecutor. After several formal notices to an offender, the procedure may result in a €1,500 fine.

iv Security

Law No. 91-646 of 10 July 1991 concerning the secrecy of electronic communications, now codified in the Internal Security Code, provides that the Prime Minister may exceptionally authorise, for a maximum period of four months (renewable only upon a new decision), the interception of electronic communications in order to collect information relating to the defence of the nation or the safeguarding of elements that are key to France’s scientific or economic capacity. The recent Law No. 2013-1168 on Military Programming (LPM) introduced a new chapter in the Internal Security Code relating to administrative access to data connection, including real-time geolocation. The new regime, which will enter into force on 1 January 2015, authorises the collection of ‘information or documents’ from operators as opposed to the collection of simply ‘technical data’, which is authorised under the current law. In addition, access to data organised by the new regime is exclusively administrative, namely, without judicial control. Requests for implementing such measures are submitted by designated

31 New Articles L246-1 et seq. of the Internal Security Code introduced by Article 20 of the LPM.
32 Article 20 IV of the LPM.
administrative agents to a ‘chosen personality’ appointed by the National Commission for the Control of Security Interceptions (CNCIS) upon proposal of the Prime Minister. CNCIS will be in charge of controlling (a posteriori) administrative agents’ requests for using geolocation measures in the course of their investigation. The Minister for Internal Security, the Defence Minister and the Finance Minister can also issue direct requests for the implementation of real time geolocation measures to the Prime Minister, who, in this case will directly grant authorisations.

The collection and future processing of personal data is subject to several cumulative conditions, which include information, consent and legitimate purpose, and – as a matter of principle, subject to certain exceptions – no transfer outside the EU. Any operator that determines the purposes and the manner in which personal data are processed is considered a ‘data controller’ and therefore needs to file a prior declaration of such processing to the CNIL. According to the CNIL, IP addresses are considered as personal data.

In addition to these general rules applicable to the protection of personal data, the CPCE provides specific rules pursuant to which operators must delete or preserve the anonymity of any traffic data relating to a communication as soon as it is complete.33 Exceptions are provided, however, in particular for the prevention of terrorism and in the pursuit of criminal offences.

French e-consumers benefit from consumer law provisions and from specific regulations. In particular, they are protected against unsolicited communications (such as spam) insofar as their consent is required prior to the use of their personal data for commercial exploitation. Moreover, consumers must be provided with valid means by which they may effectively request that such unsolicited communications cease.

Data used for the purpose of location identification are also to be considered as personal data in the meaning of the Law No. 78-17 of 6 January 1978 on Information Technology, Data Files and Civil Liberties. In the past few years, the CNIL has taken decisions on statistical measures of advertising effects based on locational identification of smartphones, pay-as-you-drive systems, anti-theft devices, Google Latitude and Google Street View. Two conditions are usually required: the individual’s knowledge and consent.

Any person under 18 is considered a child under French law. Unlike in the US, there is no specific statute governing the protection of children online. In general terms, the Law of 21 June 2004 provides that an ISP should inform subscribers where there is a technical means of restricting access to selected services.

As for privacy, children’s online rights are protected in the same way as those of adults. According to CNIL practice, collecting children’s personal data is allowed only with prior authorisation from their parents and if clear information is provided to the child.

In addition, provisions aimed at protecting children against activities or products such as pornography, gaming or alcohol are enshrined in criminal law and in a range of sectorial legislation. In order to increase the efficiency of the existing provisions meant to

33 See Articles L34-1 and D98-5 of the CPCE.
prevent child pornography, Law No. 2011-267 on Performance Guidance for the Police
and Security Services (LOPPSI 2) allows the administrative authorities to order an ISP
to cut access to websites displaying images of child abuse.\textsuperscript{34} Law No. 2010-788, dated
12 July 2010 (Grenelle II), also forbids any type of communication with the purpose of
promoting the sale, the provision or the use of a mobile for children under 14 years old.\textsuperscript{35}

Unauthorised access to automated data-processing systems is prohibited by Articles
323-1 to 323-7 of the French Penal Code. In addition, with regard to cyberattacks,
LOPPSI 2 introduced a new offence of online identity theft at Article 226-4-1 of the
French Penal Code and empowers police officers, upon judicial authorisation and only for
a limited period, to install software in order to observe, collect, record, save and transmit
all the content displayed on a computer’s screen. It helps the detection of infringements,
the collection of evidence and search for criminals by facilitating the creation of police
files and by organising their coordination.

In terms of personal data protection, LOPPSI 2 increases the instances where
authorities may set up, transfer and record images on public roads, premises or facilities
open to the public in order to protect the rights and freedom of the individuals, and
recognises that the CNIL has jurisdiction over the control of video protection systems.

\textbf{v} \hspace{1cm} \textbf{Cloud computing services}

Cloud computing services, which comprise Iaas, Paas or Saas provision, have considerably
developed in recent years. However, their use by companies raises new questions in terms
of legal and risk management.

After the launch of a public consultation at the end of 2011, in order to clarify
the applicable legal framework, the CNIL issued in 2012 practical recommendations
for French companies, in particular small and medium-sized ones, contemplating using
cloud computing services.\textsuperscript{36} The guidance sets out a checklist applicable to both private
and public clouds and with seven key steps to be followed by cloud customers, which can
be summarised as follows:

\begin{enumerate}[a]
  \item Identify the types of data and the data processing that could go to a cloud provider,
  particularly focusing on data such as personal data, sensitive personal data (within
  the meaning of the 95/46 EC Directive) as well as data that is strategic for the
  customer.
\end{enumerate}

\textsuperscript{34} See Article 6 of the Law of 21 June 2004.
\textsuperscript{35} Article L5231-3 of the Public Health Code.
\textsuperscript{36} CNIL, ‘Recommandations pour les entreprises qui envisagent de souscrire à des services
de Cloud computing,’ available at www.cnil.fr/fileadmin/images/la_cnil/actualite/Recommandations_pour_les_entreprises_qui_envisagent_de_souscrire_a_des_services_de_Cloud.pdf; and ‘Synthèse des réponses à la consultation publique sur le Cloud computing lancée par la CNIL d’octobre à décembre 2011 et analyse de la CNIL,’ 25 June 2012,
b Determine the customer’s requirements in terms of security from a legal (e.g., localisation of the data), technical (e.g., interoperability with the existing system) and practical (e.g., reversibility and data portability) standpoint.

c Undertake a risk analysis so as to ensure an adequate level of security.

d Identify the right cloud offering (Saas, PaaS, or IaaS; private, public or hybrid cloud solutions) based on the findings and conclusions of steps (a) and (b) (e.g., a public IaaS cloud for the website of the company and a private SaaS cloud for company e-mails).

e Choose the right cloud provider with sufficient service and privacy-level guarantees. First, this involves determining whether the cloud provider will act as a data processor (with the result that the cloud customer will bear full responsibility for the compliance of the data processing with French law) or as joint data controller. While the CNIL admits that cloud providers should generally be regarded as processors, it states that the provider will be a joint controller if it exclusively determines the technical means, with no real leverage for the customer to negotiate them (these considerations are not new – the CNIL had already outlined them in a former recommendation relating to cross-border transfer of data). In cases where the provider acts as joint controller, the CNIL recommends that the customer be responsible for the necessary filing with the CNIL and for providing the data subjects with information notices, while the customer and provider should both be responsible for implementing the confidentiality and security measures. In any event, the CNIL remains at liberty to redefine the relationship regardless of what is stated in the contractual provisions. Second, the CNIL imposes an obligation to include certain essential elements in the cloud computing contract. For the CNIL, this includes contractual provisions addressing, among other things, how complaints will be dealt with, notification of unauthorised access, a duty of cooperation with the data protection authorities, audit rights, requirements as to the location of the data and service-level agreements with penalties. The working document contains a list of recommended contractual clauses setting out these essential elements.

f Revisit customer’s IT security policy in light of the conclusions of the risk analysis conducted in step (c).

g Update the risk analysis regularly.

In the document, the CNIL also suggests some model contractual clauses that can be included in cloud computing agreements.

IV SPECTRUM POLICY

i Development
The management of the entire French radio frequency spectrum is entrusted to a state agency, the National Frequencies Agency. It apportions the available radio spectrum, whose allocation is administered by governmental administrations (e.g., those of civil aviation, defence, space, the interior) and independent authorities (ARCEP and the CSA) (see Section II.ii, supra).
In recent years, French spectrum policy has primarily concerned the development of DTTV and the digital dividend. The total transition to DTTV was completed on 30 November 2011.

ii Flexible spectrum use

The trend towards greater flexibility in spectrum use is facilitated in France by the ability of operators to trade frequency licences, as introduced by the Law of 9 June 2004.37 The general terms of spectrum licence trading were defined by Decree No. 2006-1016 of 11 August 2006, and the list of frequency bands whose licences could be traded was laid down by a Ministerial Order of 11 August 2006. A frequency database that provides information regarding the terms for spectrum trading in the different frequency brands open in the secondary market is publicly accessible.38 The spectrum licence holder may transfer all of its rights and obligations to a third party for the entire remainder of the licence (full transfer) or only a portion of its rights and obligations contained in the licence (e.g., geographical region or frequencies). Transfer of frequency licences is subject either to prior approval of ARCEP39 or to notification to ARCEP, which may refuse the assignment under certain circumstances.40 Another option available for operators is spectrum leasing, whereby the licence holder makes frequencies fully or partially available for a third party to operate. Unlike in a sale, the original licence holder remains entirely responsible for complying with the obligations attached to the frequency licence. All frequency-leasing operations require the prior approval of ARCEP.

iii Broadband and next-generation mobile spectrum use

Until 2009, there were three 3G licence holders in France: Orange France, SFR and Bouygues Telecom. The fourth 3G mobile licence was awarded to Free Mobile on 17 December 2009.

The next stage was the allocation of spectrum in the 800MHz and 2.6GHz bands for the deployments of ultra-high-speed 4G mobile network: in that respect, licence for the 2.6GHz frequency was awarded to Bouygues Telecom, Free Mobile, Orange France and SFR in September 201141 and in December 2011, licence for the 800MHz was awarded to the same operators except Free Mobile,42 which has instead been granted roaming rights in priority roll-out areas.

In respect to mobile network, SFR and Bouygues Telecom announced in January 2014 that they have finalised and signed an agreement whereby the two operators will deploy a shared cellular network that covers a portion of France. The announcement followed the issuance of the FCA’s Opinion No. 13-A-08 of 11 March 2013 on conditions for sharing and roaming on mobile networks in which the FCA developed

37 Article L42-3 of the CPCE.
39 Article R20-44-9-2 of the CPCE.
40 Ibid.
41 Decision No. 2011-1080.
42 Decision No. 2011-1510.
in particular the conditions under which network sharing between mobile phone operators may be permitted without harming competition.\textsuperscript{43} The announcement was welcomed by ARCEP, which indicated that resource-pooling agreements can provide telecommunications operators with a way to reduce their costs and increase the benefits passed onto users, including increased coverage and a better quality of service from both operators.\textsuperscript{44} However, ARCEP also indicated that the fulfilment of certain conditions remain to be checked. In particular, the two operators must remain independent from one another, in both their business strategies and sales. In addition, it must be ascertained that the agreement will not squeeze certain competitors out of the market. Finally, the agreement must result in better coverage and quality of service provided to end users. These improvements must be quantifiable and verifiable over time. The ARCEP announced that it will work closely with the FCA on performing a detailed examination of the agreement, to verify whether these various conditions have indeed been met. It also remains to be seen how the recent acquisition of SFR by Altice/Numericable will affect the network sharing agreement between SFR and Bouygues Telecom.

iv Spectrum auctions and fees

Spectrum auctions in case of scarce resources

Pursuant to Article L42-2 of the CPCE, when scarce resources such as RF are at stake, the ARCEP may decide to limit the number of licences, either through a call for applications or by an auction. The government sets the terms and conditions governing these licensing selection procedures, and until now such proceedings have always been in the form of calls for applications.

Fees

Depending on their size and their turnover, electronic communication operators are subject to different types and levels of fee.\textsuperscript{45} If an operator’s licence only covers one region in France or its overseas regions, the fee is reduced by half.

In addition to these fees and pursuant to Articles R20-31 to R20-44 of the CPCE, licensed operators contribute to the financing of the universal services.

V MEDIA

i Restrictions on the provision of service

Media are, in particular, subject to a certain number of content requirements and restrictions.

\textsuperscript{43} Available at www.autoritedelaconcurrence.fr/user/avisdec.php?numero=13A08.
\textsuperscript{44} See ARCEP press release on 31 January 2014.
\textsuperscript{45} Article 45 of the Law of Finance of 1987 as amended.
**Content requirements**
At least 60 per cent of the audio-visual works and films broadcasted by licensed television broadcasters must have been produced in the EU and 40 per cent must have been produced originally in French.46

As to private radio broadcasters they must – in principle – dedicate at least 40 per cent of their musical programmes to French music.47

**Advertising**
Advertising is particularly regulated in television broadcasting.48 In particular, advertising must not disrupt the integrity of a film or programme and there must be at least 20 minutes between two advertising slots. Films may not be interrupted by advertising that lasts more than six minutes.

Rules governing advertisements are stricter on public channels. In particular, since 2009, advertising is banned on public service broadcasting channels from 8pm to 6am. This prohibition does not, however, concern general-interest messages, generic advertising (for the consumption of apples, dairy products, etc.) or sponsorships, which may continue to be broadcasted.

In addition, some sectors are prohibited from advertising such as alcoholic beverages above a certain level of alcohol or tobacco products.

**ii Digital switchover**
The digital switchover was carried out in most areas of France and was completed by the end of 2011.

The current landscape of free-to-air DTTV channels is composed of 25 public and private channels,49 which already represents a wide range according to a recent statement by the CSA (see Section VI.i, supra).

As regards pay-DTTV channels,50 Article 42-3 of the Law of 30 September 1986 as amended by Law No. 2013-1028 now permits the CSA to allow a pay service to broadcast in free-to-air or vice versa. The CSA recently used this new power to reject applications from TF1, M6 and Canal Plus groups to shift three of their respective pay-television channels to free-to-air (see Section VI.i, infra). Digital terrestrial radio was technically launched on 20 June 2014 and in July 2014, the CSA announced that approximately 60 stations were broadcasting using digital terrestrial radio. The CSA also

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46 Articles 7 and 13 of Decree No. 90-66 of 17 January 1990.
49 The list of free-to-air DTTV channels can be found on the CSA website at www.csa.fr/Television/Les-chaines-de-television/Les-chaines-hertzziennes-terrestres/Les-chaines-nationales-gratuites.
50 The list of pay-DTTV channels can be found on the CSA website at www.csa.fr/Television/Les-chaines-de-television/Les-chaines-hertzziennes-terrestres/Les-chaines-nationales-payantes.
France

announced that it will release a report on the status of digital terrestrial radio in France in the autumn 2014, a few months after its official launch.\(^{51}\)

iii Internet-delivered video content

Internet video distribution refers to IPTV services, which can be classified into the three following main categories: live television, time-shifted programming and VOD.

For customers who cannot afford triple-play offers, access to video content is limited to the content of free channels. The regulatory framework for ‘social’ offers set by the Law of 4 August 2008 is indeed limited to mobile telephony offers, triple play offers being thus outside its scope. Following the FCA’s Opinion No. 11-A-10 and in the absence of regulation, France Télécom-Orange launched a ‘social tariff’ for multi-service offers (telephone and internet) (see Section III.ii, *supra*).

iv Mobile services

Mobile personal television, initiated in 2007, has suffered from substantial delays due to disagreements among operators and content providers on the applicable economic model and on how to finance the deployment of a new network.

Thus, on 8 April 2010, the CSA delivered authorisations to 16 channels (13 private channels selected by the CSA after the call for applications launched on 6 November 2007, together with three public channels selected by the government) for the broadcasting of personal mobile television services.

On 22 April 2010, TDF\(^{52}\) and the operator Virgin Mobile signed an agreement under which TDF committed to developing the new network with up to a 50 per cent coverage of the ‘outdoor’ population and 30 per cent of the ‘indoor’ population, with Virgin Mobile paying TDF a monthly per-customer fee using DVB-H, an airwave broadcasting format that does not allow interaction with the user. However, after Virgin Mobile’s decision to withdraw from the project, TDF decided to end the agreement in January 2011 and in June 2011 it announced that it no longer wished to be the DVB-H operator in charge of mobile personal television. Further to TDF’s withdrawal, the CSA granted a two-month period to the selected channels to appoint a new operator in charge of mobile personal television. On 14 February 2012, no operator being appointed, the CSA acknowledged that the project was abandoned and withdrew the authorisations it delivered to the 16 channels on 8 April 2010.\(^{53}\)

VI THE YEAR IN REVIEW

i Reforms on the independence of the French public service broadcasting

On 15 November 2013, the French parliament adopted two Laws (Organic Law No. 2013-1026 and Law No. 2013-1028) aiming at increasing the independence of French public service broadcasting. In particular, the two Laws amend the CSA governance

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\(^{51}\) See the CSA press release of 24 July 2014.

\(^{52}\) TéléDiffusion de France.

\(^{53}\) Decision No. 2012-275.
(including its legal nature, composition, the status and appointment procedure of its members and their powers) as well as the procedure for appointment of presidents of the French public broadcasting companies.

**CSA governance**

Pursuant to the provisions of Law No. 2013-1028, the composition of the CSA board is amended from nine to seven members and their appointment is now shared between the French President, the President of the National Assembly and the President of the Senate. The Chair will be the only member appointed by the French President. The appointment is however subject to a non-veto on the part of parliamentary committees in charge of cultural matters. Requirements relating to future members' experience and expertise have also been introduced.

In addition, to ensure that the CSA's power to impose sanctions fully complies with constitutional and European requirements for due process and impartiality, the new provisions have provided for prosecution and sanction to be handled by two different bodies. Prosecution will be handled by an independent rapporteur, appointed by the Deputy Chairman of the Council of State from among its judges.

Finally, the CSA's status has been modified from that of an independent authority to that of a public independent authority. As a public independent authority, the CSA now enjoys legal personality; as such, it will be better positioned to set its own management priorities, according to the appropriations voted and evaluated on an annual basis by Parliament.

The CSA's new governance scheme has been in effect since 1 January 2014.

**Appointment of presidents of the French public broadcasting companies**

Pursuant to the provisions of the organic Law No. 2013-1026, the power to appoint presidents of the French public broadcasting companies (France Télévisions, Radio France, French external broadcasting) has been withdrawn from the President of France. French public broadcasting companies will now be appointed by the CSA, as was the case until 2009.

**Recent rejection of applications for free-to-air broadcasting**

At the beginning of the year, TF1, M6 and Canal Plus groups sought the authorisation by the CSA to shift three of their respective pay-DTTV channels (LCI, a 24-hour news channel, Paris Première, a high-end cultural channel and Planète+, a documentary channel) to free-to-air, pursuant to new Article 42-3 of the Law of 30 September 1986. On 29 July 2014, the CSA rejected the three applications.54

The CSA said it based its decision primarily in consideration of three general issues: it first considered that the advertising market remained weak and that there were not enough revenues potential for more free-to-air channels. It also indicated that some free-to-air channels, in particular those launched recently, could be put at risk if the shift was approved. Finally, it indicated that, looking at the overall supply and demand

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for television consumption, the current landscape of 25 free-to-air channels already represented a wide range.

In addition, the CSA indicated that it analysed for each channel, whether a shift to free-to-air would be likely to affect the preservation of editorial diversity. As for LCI in particular, the CSA indicated that a shift to free-to-air could destabilise the two other 24-hour news channels (i>Télé, owned by Canal plus group, and BFM TV).

The CSA indicated that the decisions were issued further to an in-depth investigation process and that in particular the CSA asked for FCA’s opinion.

It is interesting to note that, a few days after the CSA’s decisions were issued, the FCA released its opinion on the matter.55 The FCA concluded that the main competitive impact would concern LCI’s shift to free-to-air. Thus the FCA limited its recommendations to TF1 group only.

In reaction to the CSA’s decision, TF1’s CEO Nonce Paolini said that it was likely that LCI will shut down after 31 December 2014 if it cannot shift to free-to-air. It remains to be seen how the decision will ultimately affect the viability of the three pay-DTTV channels.

ii Concentration in the telecommunications sector

During spring 2014, the Vivendi group announced that it had chosen the offer of the cable operator Numericable, a subsidiary of the Altice group, to acquire its subsidiary SFR, France’s second-largest mobile operator. The FCA, in charge of reviewing the merger, indicated in July 2014 that it considered that the transaction raised serious competition concerns, thus requiring an in-depth investigation (i.e. Phase II merger control procedure).

The final acceptance by Vivendi group of the Altice/Numericable offer at the end of June 2014 ended a long bidding war between Altice and SFR’s mobile rival Bouygues Telecom, which launched the debate over a possible consolidation from four to three mobile operators in France. Other European countries have seen such a shift to three mobile operators (in Austria for instance, which used to have five mobile operators). Operators argue that it is only by way of consolidation that they will have the necessary scale to be able to invest in network infrastructure as they are encouraged to do so in the EU by the European Commission in particular.

On the other hand, a recent survey has shown significant prices decreases in mobile services since the entry of the fourth mobile operator (by 27.2 per cent on average in 2013).56

During the course of the Phase II procedure, the FCA is to engage in extensive consultation with stakeholders in the markets. It will also consider the opinions of ARCEP and the CSA. In that respect, ARCEP indicated in a press release of 24 July 2014 that it had submitted its opinion to the FCA.

Appendix 1

ABOUT THE AUTHORS

SIMON BERRY
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Simon Berry is a counsel in the Hong Kong office of Latham & Watkins and a member of the corporate department.

Mr Berry has extensive experience in regulatory law. His practice also focuses on a broad range of mergers and acquisitions, reorganisations, post-acquisition integration and corporate finance transactions involving regulated entities such as banks, insurance companies and financial institutions.

His experience in regulatory matters includes licensing and advisory work covering a wide range of regulated activities including securities, commodities, futures and other derivatives, asset management and proprietary trading including offerings of investment products, outsourcing, e-commerce-related issues, data privacy, internet securities trading and e-banking matters. He has advised on the acquisition and disposal of a number of licensed entities as well as members of stock exchanges, futures exchanges, clearing companies and other regulated entities.

His experience in mergers and acquisitions includes takeover offers, sales and purchases of businesses and companies, direct investments, private equity, joint ventures, mergers by legislation, schemes of arrangement and other commercial agreements. He has also advised on transactions involving television companies and radio broadcasting companies. He is the chairman of the Competition Law Committee of the Law Society of Hong Kong.

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Mr Colahan is based in Latham & Watkins’ London office and divides his time with the Brussels office. Prior to joining Latham & Watkins, Mr Colahan was the international antitrust counsel, based in London, for The Coca-Cola Company where his responsibilities included advising all operating groups on strategic planning and implementation of a wide variety of international joint ventures and acquisitions as well as the conduct of
international antitrust litigation and investigations. Mr Colahan has also served as a legal adviser on European law to the European secretariat of the UK Cabinet Office and has represented the UK in numerous cases.

He represents clients before the European Commission, national authorities in Europe and internationally, as well as conducting litigation in the European courts and numerous national courts. He has advised on a wide variety of international antitrust matters, including structuring and implementation of international mergers, acquisitions and joint ventures, cartel enforcement, single firm conduct and compliance counseling. Mr Colahan has worked in a broad range of sectors including, fast-moving consumer goods, alcoholic and non-alcoholic beverages, retail, media and publishing, pharmaceuticals, aviation, manufacturing, agricultural, defence, bulk chemicals, maritime, energy, software, supply of professional services, telecommunications and finance.

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Gail Crawford is a partner in the London office. Her practice focuses primarily on technology, data privacy and security, intellectual property and commercial law and includes advising on technology licensing agreements and joint ventures, technology procurement, data protection issues and e-commerce and communications regulation. She also advises both customers and suppliers on multi-jurisdictional IT, business process and transformation outsourcing transactions. Ms Crawford has extensive experience advising on data protection issues including advising a global corporation with operations in over 100 countries on its compliance strategy and advising a number of US e-commerce and web businesses as they expand into Europe and beyond. She also advises online businesses and providers of communications services on the impact of the UK and European restrictions on interception and disclosure of communications data.

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Carmen Guo is an associate in the Hong Kong office of Latham & Watkins and a member of the corporate department.

Her practice focuses on advising banks and financial institutions on regulatory and compliance issues under Hong Kong’s financial regulatory regime, including licensing matters, selling restrictions, disclosure issues and marketing of securities.

Ms Guo’s experience in the corporate finance area includes advising on acquisitions from Hong Kong law perspective, public offerings and compliance matter for listed companies in Hong Kong.

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John P Janka is a partner in the Washington, DC office of Latham & Watkins LLP, where he is chair of the communications law practice group. For 26 years, Mr Janka has counselled international telecommunications operators and ISPs, content providers, investors and banks on a variety of regulatory, transactional and controversy matters. His experience includes the purchase, sale and financing of communications companies, the procurement and deployment of communications facilities, global spectrum strategies and dispute resolution, the provision of communications capacity, content distribution,
strategic planning, and effecting changes in legal and regulatory frameworks. His clients include satellite, wireless and other terrestrial communications companies, video programming suppliers, information service providers, television and radio broadcast stations, and firms that invest in and finance these types of entities.

Mr Janka has served as a United States delegate to an ITU World Radiocommunication Conference in Geneva, and as a law clerk to the Honorable Cynthia Holcomb Hall, United States Court of Appeals for the Ninth Circuit. Mr Janka holds a JD degree from the University of California at Los Angeles School of Law, where he graduated as a member of the Order of the Coif, and an AB degree from Duke University, where he graduated magna cum laude.

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Jean-Luc Juhan is a partner in the corporate department in the Paris office of Latham & Watkins.

His practice focuses on outsourcing and technology transactions, including business process, information technology, telecommunications, systems and software procurement and integration. He also has extensive experience advising clients on all the commercial and legal aspects of technology development, licensing arrangements, web hosting, manufacturing, distribution, e-commerce, entertainment and technology joint ventures.

Mr Juhan is in particular cited in Chambers Europe 2014, Option Droit & Affaires 2014 and Legal 500 Paris 2014: “Great negotiator” Jean-Luc Juhan, who is “very sharp and down-to-earth” and has “a very good knowledge of the industry”, advises high-profile French and international groups on large outsourcing, telecommunication and integration system projects.

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Mr Lipsky is a partner in the Washington, DC office of Latham & Watkins. He is internationally recognised for his work on both US and non-US antitrust and competition law and policy and has handled antitrust matters throughout the world. He served as Deputy Assistant Attorney General for Antitrust in the Reagan Administration. Having served as Chief Antitrust Lawyer for The Coca-Cola Company from 1992 to 2002, Mr Lipsky has incomparable experience with antitrust in the US, EU, Canada, Japan and other established antitrust-law regimes, as well as in new and emerging antitrust-law regimes in scores of jurisdictions that adopted free-market policies following the 1991 collapse of the Soviet Union. He has been closely associated with efforts to streamline antitrust enforcement around the world, advocating the reduction of compliance burdens and the harmonisation of fundamental objectives of antitrust law.

Mr Lipsky was the first International Officer of the American Bar Association Section of Antitrust Law. He served on the Editorial Board of Competition Laws Outside the United States (2001), the most ambitious annotated compilation of non-US competition laws yet produced. He has held a variety of senior positions among the officers and governing council of the Section of Antitrust Law and continues to serve
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Laura Johanna Reinlein is an associate in the Hamburg office of Latham & Watkins LLP, practising in the firm’s litigation department. Dr Reinlein wrote her doctoral thesis on the topic of control of concentrations in the media sector under the influence of media convergence. During her legal studies at Johannes Gutenberg University at Mainz she worked as a research associate at the chair of public and media law under Professor Karl-E Hain, mainly in the field of media, constitutional and administrative law. During her legal traineeship she worked, *inter alia*, for a public broadcasting corporation and the State Media Authority of Bavaria.

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Myria Saarinen is a partner in the Paris office of Latham & Watkins. She has extensive experience in IP and IT litigation, including internet and other technology-related disputes. She is very active in litigation relating to major industrial operations and is involved in a broad range of general commercial disputes.

She has developed specific expertise in the area of privacy and personal data, including advising clients on their transborder data flows, handling claims raised by the French Data Protection Authority and setting up training sessions on the personal data protection framework in general and on specific topics. She also has expertise in cross-border issues raised in connection with discovery or similar requests in France.

Ms Saarinen is named among leading practitioners in commercial litigation, data privacy and IT (*The Legal 500 Paris 2014, Chambers Europe 2013, Chambers Global 2013*).

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Jarrett S Taubman is counsel in the Washington, DC, office of Latham & Watkins LLP, where he represents providers of telecommunications, media, internet and other communications services (and their investors) before the Federal Communications Commission (FCC), state public utilities commissions and various courts. Mr Taubman assists clients in implementing strategies to facilitate the development of favourable regulatory policy, structuring transactions and securing required regulatory consents, and ensuring ongoing compliance with complex regulatory requirements. Much of his practice involves the navigation of the complex legal and policy issues raised by the advent of broadband services. Mr Taubman also represents both communications and non-communications clients before the Committee on Foreign Investment in the United States (CFIUS), a multi-agency group with the statutory authority to review and block proposed investments in critical US infrastructure from non-US sources.

Mr Taubman received his JD from New York University School of Law, a master’s degree in public policy from Harvard University’s Kennedy School of Government, and a BS from Cornell University’s School of Industrial and Labor Relations.

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Gabriele Wunsch is an associate in the Hamburg office of Latham & Watkins LLP, practising IP and media law in the firm’s litigation and corporate departments. She is a graduate of the Westphalian Wilhelms University at Münster and studied on the Humboldt University of Berlin’s European and civil business law postgraduate programme, promoted by the German Research Foundation, where she wrote her doctoral dissertation on the harmonisation of EU law. She completed parts of her studies and work in Germany, England, Spain, Switzerland and the United States. During her legal traineeship, Dr Wunsch worked, inter alia, for the Ministry of Foreign Affairs, in the IP and unfair competition department of another major law firm, and in the legal department of a well-known online auction house. Subsequently she completed a master’s degree (LLM) at the Technical University of Dresden and Queen Mary, University of London, specialising in intellectual property law.

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